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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 692

CONSOLIDATED FREIGHTWAYS, INC.,
a corporation,
Petitioner,

vs.

UNITED-TRUCK LINES, INC.,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Petitioner, Consolidated Freightways, Inc.,[1] respectfully prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Oregon entered in the above entitled case in the Supreme Court of Oregon

[1] Hereinafter referred to as "petitioner."

October 15, 1958 (Tr.[2] 4), which judgment was stayed by that Court's Order Staying Mandate dated November 25, 1958 (Tr. 7) entered after petitioner had filed a timely Petition for Rehearing which was denied November 12, 1958 (Tr. 6).

Opinions Below

The trial court entered no opinion. It merely entered an order sustaining respondent's demurrer (Tr. 2; 6). The opinion of the Supreme Court of Oregon is printed in Appendix A hereto, infra p. 17.

Jurisdiction

The judgment of the Supreme Court of Oregon was entered October 15, 1958. A timely petition for rehearing was denied November 12, 1958 (Tr. 6) and the Mandate was stayed November 25, 1958 (Tr. 7). This petition is, therefore, timely under 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under the "title, right, privilege or immunity" portion of 28 U.S.C. § 1257(3). In compliance with this Court's Rule 23(1)(f), petitioner states that this federal question was not ruled on by the trial court; that court merely entered an order sustaining respondent's demurrer without opinion (Tr. 2; 6). However, the sole basis for the Supreme Court of Oregon's opinion was its express denial of petitioner's claim of right under the Federal Motor

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[2] References to "Tr." herein refer to pages of the original transcript of record of proceedings in the Supreme Court of Oregon which is on file in this Court.

Carrier Act (49 U.S.C. § 301 et seq.). Not only does the opinion of the Supreme Court of Oregon (Tr. 3: 247-262) reveal no other basis of non-liability; that Court itself has entered of record its Certificate of Existence of Federal Question (Tr. 9).

Question Presented

Did the Supreme Court of Oregon err in sustaining a demurrer on the ground that a cause of action was not stated in a complaint (Tr. 2: 1-4) seeking money damages because respondent operated for compensation in interstate commerce without the certificate of public convenience and necessity required under 49 U.S.C. § 306(a)(1) in competition with petitioner which possessed the required certificate thereby diverting revenue from petitioner?

Statutes Involved

The statutory provisions involved are the Interstate Commerce Act, Part I, Sections 3(1), 8, 9 and 22, 24 Stat. 380, 24 Stat. 382, 24 Stat. 382, and 24 Stat. 387 (49 U.S.C. Sections 3(1), 8, 9, 22); Interstate Commerce Act, Part II, Sections 306(a)(1), 316(d), 317(b) and 322, 49 Stat. 551, 49 Stat. 558, 49 Stat. 560, 49 Stat. 564 (49 U.S.C. Sections 306(a)(1), 316(d), 317(b) and 322); Communications Act, Section 605, 48 Stat. 1103 (47 U.S.C. Section 605); Public Utility Holding Company Act, Section 4(a), 49 Stat. 812 (15 U.S.C. 79d); and 28 U.S.C. Sections 2101(c) and 1257(3), 62 Stat. 962 and 62 Stat. 929. They are printed in Appendix B hereto, infra p. 34.

Statement of the Case

Before stating this case, we desire to comment briefly on a prior action involving the present parties and a similar complaint. A dismissal of that complaint by the District Court for Oregon on the ground of lack of jurisdiction over the subject matter was affirmed by the Court of Appeals for the Ninth Circuit. 216 F. (2d) 543. Certiorari was denied. 349 U.S. 905. We believe it sufficient to say here that there is no question but that the Court of Appeals based its opinion on its view that ". . . Absolutely no claim is made of a right to recover based on the statute [the Motor Carrier Act] itself." 216 F. (2d) at p. 547.

We now state the present case. Petitioner's complaint (Tr. 2: 1-4) alleged that: (1) petitioner and respondent are motor carriers subject in their interstate operations to the jurisdiction of the Interstate Commerce Commission under the Interstate Commerce Act (Tr. 2: 2); (2) petitioner transported property for compensation interstate over a designated highway by express permission of the Interstate Commerce Commission obtained as required by law (Tr. 2: 2); (3) respondent transported property for compensation interstate over the same highway without such permission (Tr. 2: 3); and (4) such unlawful operations of respondent were directly competitive with petitioner's operations and resulted in a diversion of traffic and income from petitioner to that petitioner was entitled to money damages for "said unlawful operations" (Tr. 2: 4).

Respondent demurred to this complaint on the ground that it did not state a cause of action (Tr. 2; 6). The trial court sustained the demurrer without opinion and ordered a dismissal of the complaint (Tr. 2; 6). On appeal, the Supreme Court of Oregon affirmed. In its opinion, the Court extensively analyzed the Congressional history of the Federal Motor Carrier Act (Tr. 3; 253-4), distinguished this Court's opinion in *Penna. R. R. Co. v. Sonman Coal Co.*, 242 U.S. 120 (Tr. 3; 256-8) and, though stating that it was ". . . unable to find any discussion of the specific problem of the scope of relief under the Motor Carrier Act . . ." (Tr. 3; 259), nevertheless concluded that Congress intended that the Act be enforced solely by the Interstate Commerce Commission and that, accordingly, private claims for relief were precluded in both federal and state courts (Tr. 3; 262).

Reasons for Granting the Writ

The opinion on which the Supreme Court of Oregon's judgment is based decides a federal question of substance not heretofore determined by this Court, and has decided it in a way not in accord with applicable decisions of this Court.

1. There can be no question but that petitioner claimed a right under a statute of the United States within the meaning of 28 U.S.C. § 1257(3). Petitioner claimed to be entitled to money damages from respondent solely because respondent diverted revenue from petitioner by operating for compensation in interstate commerce in competition with petitioner without the

certificate of public convenience and necessity which the Federal Motor Carrier Act (49 U.S.C. § 306(a)(1)) required it to possess, while petitioner did possess the required certificate. There is also no question but that the Supreme Court of Oregon expressly considered this claim of right and expressly decided that no cause of action for money damages arose because the Federal Motor Carrier Act was violated. The Oregon Court has executed its Certificate of Existence of Federal Question (Tr. 9). Accordingly, the balance of this petition will attempt to show, as required by this Court's Rule 19(1)(a), that the federal question so decided and certified was one of *substance* not heretofore determined by this Court *and* that it was decided in a way not in accord with applicable decisions of this Court.

2. Summarily stated, the Oregon Court has construed a regulatory Act of Congress which is silent on the question of private remedies for its violation by *holding* that uncertificated interstate competition in violation of the Act is not a legal basis for money damages; and by *dicta* that only the Interstate Commerce Commission may enforce the Act and that no private remedy lies for *any* violation of the Act.

The broad dicta just stated is the first such ruling ever made. It directly conflicts with *Lyons v. Illinois Greyhound Lines*, 192 F. (2d) 538, in which the Court of Appeals for the Seventh Circuit, relying on this Court's opinion in *Henderson v. United States*, 339 U.S. 816, held in a non-diversity case that the district court had jurisdiction of an action for money damages where

violation of the section of the Motor Carrier Act prohibiting unjust discriminations (49 U.S.C. 316(d)) was alleged.

The precise and narrower point encompassed within the dicta of the Oregon Court, namely, that uncertificated competition in violation of the Act is not compensable in money damages presents a novel question never before decided by any court.

We think both the dicta and the holding, respectively, that no violation of the Federal Motor Carrier Act is compensable in money damages and that the specific violation of operating without a certificate does not give rise to money damages are substantial federal questions. As just pointed out, the dicta conflicts with an opinion of the Court of Appeals for the Seventh Circuit. The dicta and the holding, moreover, clearly present the question whether Congress intended to deny private remedies for violation of the Act by remaining silent about them while providing by 49 U.S.C. § 322 for criminal remedies and for injunctions to be sought by the Commission. This is a familiar problem. For example, this Court has considered and affirmed on the merits a construction that a federal statute (the Federal Safety Appliance Acts) intended a private remedy where the statute (as here) did not in terms provide one. *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33, 39. And exclusively criminal statutes have been construed to permit private actions for their violation. *Reitmeister v. Reitmeister*, 162 F. (2d) 691 (prohibition of wire tapping under § 605 of the Communications Act, 48 Stat.

1103, 47 U.S.C. § 605); *Goldstein v. Groesbeck*, 142 F.(2d) 422, cert. den. 323 U.S. 737 (prohibition on contracting by unregistered holding company under § 4(a) of the Public Utility Holding Company Act, 49 Stat. 812, 15 U.S.C. 79d). The dicta and the holding also present the related question whether the additional deterrent to illegality, which an action for money damages would provide, was intended to be permitted by Congress as not inconsistent with Congress' regulatory purpose (The Commission has been granted an injunction with respect to the very activities of respondent complained of here. *United Truck Lines v. Interstate Commerce Commission*, 189 F. (2d) 816, cert. den. 342 U.S. 830.). Finally, the holding that violating the Act by operating without a certificate in competition with a certificate holder does not give rise to money damages is a holding that the historic remedy at common law of an action for money damages to protect a franchise is not available. This Court has held that there was such an action at common law (*East Hartford v. Hartford Bridge Co.*, 10 How. 541), as have many other courts (*Hammerton v. Dysart* [1916], 1 AC 57, 85; *Harrell v. Elisworth*, 17 Ala. 576, 584-5; *City of New York v. Starin*, 106 N.Y. 1, 12; *Carroll v. Campbell*, 108 Mo. 550, 568; *McInnis v. Pace*, 78 Miss. 550, 558). In view of the fact that the Federal Motor Carrier Act specifically reserves common law remedies (49 U.S.C. § 317(b) incorporating § 22 of 49 U.S.C.), we see no reason why the historic remedy of an action at common law for money damages should not be available to protect a franchise represented by a certificate of public

convenience and necessity. The Oregon holding eliminates this remedy for the first time.

These questions ought to be settled by this Court and not left for agreement or disagreement with the Oregon Supreme Court by countless Federal and State Courts. The questions are of sufficient importance so that an authoritative decision ought to be made one way or the other at this time. Of course, this Court has often granted certiorari to review state courts' views of the construction or scope of a federal statute. *Moore v. C. & O. Ry. Co.*, 291 U.S. 205, 214. *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U.S. 281, 293.

3. While the Oregon Supreme Court's holding decides a federal question not heretofore decided by this or any other Court, such holding is not in accord with applicable decisions of this Court. That is to say, while the question was novel, previous decisions of this Court clearly pointed the way to a decision in petitioner's favor. Petitioner's theory below appears in 3 Restatement of Torts, § 710, p. 527:

> Sec. 710. Engaging in Business in Violation of Legislative Enactment.
>
> One who engages in a business or profession in violation of a legislative enactment which prohibits persons from engaging therein, either absolutely or without a prescribed permission, is subject to liability to another who is engaged in the business or profession in conformity with the enactment, if, but only if,
>
> (a) one of the purposes of the enactment is to protect the other against unauthorized competition, and
>
> (b) the enactment does not negative such liability."

The Oregon Supreme Court agreed that the *Restatement* rule was sound (Tr. 3: 250); and it also agreed that one of the purposes of the enactment of the Federal Motor Carrier Act (49 U.S.C. § 301 et seq.) was to protect against unauthorized competition (Tr. 3: 250). But the Court denied liability because it thought the Act "negatived such liability". In so deciding, the Court recognized that the absence in the Federal Motor Carrier Act of statutory private remedies and forums such as those provided in §§ 8 and 9 of Part I of the Interstate Commerce Act regulating railroads (49 U.S.C. § 1 et seq.) was not enough to deny private liability under Part II of the Act (49 U.S.C. § 301 et seq.) because of this Court's opinion in *Pennsylvania R. R. v. Sonman Coal Co.*, 242 U.S. 120. The Oregon Court properly held that the *Sonman* opinion meant that Part I's § 22 reservation of common law remedies permitted actions in state courts for money damages for violation of Part I, though Part I by § 9 permitted such actions only in Federal Courts or before the Interstate Commerce Commission. The Oregon Court further properly held that the *Sonman* opinion was relevant because § 317(b) of the Federal Motor Carrier Act (49 U.S.C. § 317(b)) incorporated § 22 by reference. Yet the Oregon Court distinguished *Sonman* on the ground that in *Sonman* the violated statutory duty to supply coal cars on reasonable demand was a common law duty prior to its incorporation into Part I, while in the case before the Oregon Court the duty not to operate without a certificate was created only by the Federal Motor Carrier Act and was not a pre-existing common law duty (Tr. 3: 257-8).

The Oregon Court's distinction exists: but the legal difference is one created by the Oregon Court: it is not based on anything said by this Court in the *Sonman* opinion. In fact as we shall see in a moment, *Sonman* expressly holds that state courts may award damages for violation of the Act whether the violated duty was first created by the Act or was a common law duty incorporated into the Act. In any event, the important thing is not the fact that the Oregon Court was wrong in this particular case: the important thing is that the Court created limitation is an unwarranted limitation on an Act of Congress. (Of course, the Oregon Court thought its ruling accorded with the *Sonman* opinion, but it did not.) The limitation necessarily misinterprets the intent of Congress, because *Sonman* is this Court's latest word on the meaning of § 22 and it is elementary that where a statute is enacted (i.e., when § 22 was incorporated into Part II's § 317(b)) which has previously been interpreted, the enactment carries the interpretation with it. *Interstate Commerce Commission v. B & O Railroad*, 145 U.S. 263, 284, citing *McDonald v. Hovey*, 110 U.S. 619. This brings us to an analysis of the *Sonman* opinion.

Sonman was an action against a railroad for money damages in a state court for failure to comply with a reasonable demand for coal cars. Plaintiff relied on a violation of the Interstate Commerce Act. The state court permitted recovery over defendant's contention that the Act did not permit actions in state courts. This Court was concerned about the state court's jurisdiction. It said:

> "It is true that Secs. 8 and 9 deal with the redress of injuries resulting from violations of the act and give the person injured a right either to make complaint to the Interstate Commerce Commission or to bring an action for damages in a federal court, but not to do both. If the act said nothing more on the subject it well may be that no action for damages resulting *from a violation of the act could be entertained by a state court*. But the act shows that Secs. 8 and 9 did not completely express the will of Congress as respects the injuries for which redress may be had or the modes in which it may be obtained, for Sec. 22 contains this important provision: 'Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' The three sections, if broadly construed, are not altogether harmonious, and yet it evidently is intended that all shall be operative. Only by reading them together and in connection with the act as a whole can the real purpose of each be seen." (242 U.S. at p. 123, Italics added).

This quotation poses the problem before the Court namely, may state courts award money damages for *violations of the Act*. This Court's answer was:

> ". . . if no administrative question be involved, as well may be the case, a claim for damages for failing upon reasonable request to furnish to a shipper in interstate commerce a sufficient number of cars to satisfy his needs, *may be enforced in either a federal or a state court* without any preliminary finding by the Commission, and this *whether the carrier's default was a violation of its common law duty existing prior to the Hepburn Act of 1906, or of the duty prescribed by that act*, ibid. 132-135 (citing cases) (242 U.S. at p. 124, Italics added).

In support of these views, this Court cited *Pennsylvania R. R. Co. v. Puritan Coal Co.*, 237 U.S. 121. That was a case similar so far as is here material to *Sonman*; that is, it involved a state court action for violation of the Act. This Court said:

> "Construing, therefore, §§ 8, 9 and 22 in connection with the statute as a whole, it appears that the Act was both declaratory and creative. It gave shippers *new rights*, while at the same time preserving existing causes of action. It did not supersede the jurisdiction of *state courts in any case, new or old*, when the decision did not involve the determination of matters calling for exercise of the administrative powers and discretion of the Commission; or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive." (citing cases) (237 U.S. at p. 130, Italics added).

Section 22, then, clearly has been interpreted by this Court to permit actions in state courts for violations of duties imposed by Part I of the Interstate Commerce Act *whether or not those duties were common law duties prior to their incorporation in the Act*. Since Congress must have been aware of this interpretation when it incorporated § 22 into Part II's § 317(b) 20 years later, it follows that the Oregon Court erred in limiting 317(b) to actions for breach of duties which were formerly common law duties. In view of this Court's interpretation, it also follows that had Congress intended the Oregon limitation it would have said so.

The consequence of the Oregon Court's error is a misinterpretation of the intent of Congress. Indeed, the error of the Oregon Court becomes even clearer

when one considers that state courts have always awarded money damages for violations of the Act even where it was clear that the violated duty never was a common law duty, but was a duty first imposed by the Interstate Commerce Act. Thus *Interstate Commerce Commission v. B. & O. Railroad*, 145 U.S. 263, 275-6, holds that the prohibition of undue preferences contained in § 3 of the original Interstate Commerce Act (now 49 U.S.C. § 3(1)) never was a common law duty, and that a principal reason for passing the Act was to prevent such preferences. In 1916, the New York Court of Appeals held that allowances by a railroad for services performed by the consignee after delivery violated this section and ordered the allowances returned. *New York Cent. & H. R. R. Co. v. General Electric Co.*, 219 N.Y. 227. And in 1940, the same Court affirmed a judgment for money damages for violating § 3(1), this time relying on § 22 and citing *Pennsylvania R. R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121. *Hewitt v. N. Y., N. H. & H. R. R. Co.*, 284 N.Y. 117. Finally, when this section of Part I (49 U.S.C. § 3(1)) was enacted as Part II's § 316(d), the Court of Appeals for the Seventh Circuit held in a non-diversity case that the district court had jurisdiction of an action for money damages where it was alleged that the section was violated. *Lyons v. Illinois Greyhound Lines*, 192 F. (2d) 533. It seems clear that the *Lyons* opinion would be followed in a state court were an issue under § 316(d) to be tendered to it in view of the New York precedents.

Conclusion

For the reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

February 4, 1959.

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Counsel for Petitioner.

Appendix A

No. 6091—October 15, 1958

IN THE SUPREME COURT OF THE STATE OF OREGON

Department 2.

CONSOLIDATED FREIGHTWAYS, *Appellant*, *v. UNITED TRUCK LINES, Respondent.*

Appeal from Circuit Court, Multnomah County.

COLON R. EBERHARD, Judge Pro Tem.

Argued and submitted September 11, 1958.

James P. Cronan, Jr., Portland, argued the cause for appellant. With him on the brief were Schafer, Cronan & Nelson, and James A. Nelson, Portland.

Jerome Williams, of Spokane, Washington, argued the cause for respondent. With him on the brief were Humphreys, Jones & Templeton, of Portland, David P. Templeton, Richland, Washington, and Cashatt & Williams, Spokane, Washington.

Before PERRY, Chief Justice, and LUSK, SLOAN and O'CONNELL, Justices.

AFFIRMED.

O'CONNELL, J.

This is an action brought by the plaintiff, a motor carrier engaged in transporting property, to recover damages resulting from the unauthorized diversion of traffic by the defendant, which is also a motor carrier.

Both parties are common carriers of property in interstate commerce and are subject to the Motor Carrier Act, Title 49 USCA, §§ 301, et seq. The plaintiff holds a certificate of public convenience and necessity from the Interstate Commerce Commission which authorizes it to transport property over U. S. Highway No. 30 between Boise, Idaho and Pasco, Washington, including the highway through Baker, La Grande and Pendleton, Oregon. The defendant, without a certificate authorizing him to do so, engaged in the trucking business over this route in competition with the plaintiff.

In a suit instituted by the Interstate Commerce Commission the defendant was enjoined from operating over the above-described route. *United Truck Lines v. Interstate Commerce Commission*, 189 F2d 816, 9th Cir (1951); certiorari denied, 342 US 830.

Thereafter the plaintiff instituted an action against the defendant in the United States District Court for the District of Oregon to recover damages for the unlawful diversion of traffic by the defendant. The defendant filed a motion to dismiss, challenging the jurisdiction of the District Court on the ground that there was no diversity of citizenship between the parties (both being Washington corporations) and that a federal question was not involved. The District Court granted the defendant's motion, whereupon the plaintiff appealed to the United States Court of Appeals for the Ninth Circuit. The judgment of the lower court was sustained, it being held that the Motor Carrier Act excluded a private remedy in the federal courts for a

violation of its provisions. *Consolidated Freightways v. United Truck Lines*, 216 F2d 543 (US Court of Appeals, 9th Cir, 1954). Certiorari was denied, 349 US 905, 99 L Ed 1242.

The plaintiff's complaint in the action before us is based upon the theory expressed in 3 Restatement of Torts, Section 710, as follows:

> "Sec. 710. Engaging in Business in Violation of Legislative Enactment.
>
> "One who engages in a business or profession in violation of a legislative enactment which prohibits persons from engaging therein, either absoluely or without a prescribed permission, is subject to liability to another who is engaged in the business or profession in conformity with the enactment, if, but only if,
>
> "(a) one of the purposes of the enactment is to protect the other against unauthorized competition, and
>
> "(b) the enactment does not negative such liability."

Applying the foregoing statement of the rule to the instant case, the plaintiff contends that it was engaged in the trucking business pursuant to a certificate issued under the Motor Carrier Act; that the defendant operating without a franchise covering the route assigned to the plaintiff diverted the plaintiff's business; that plaintiff's certificate was intended to protect it from such unauthorized competition and that the Motor Carrier Act did not negative the defendant's liability for interference with the plaintiff's franchise. The defendant demurred to the complaint on the ground that it failed to state a cause of action. The trial court

sustained the demurrer and judgment was entered dismissing the action. We are called upon to decide whether the trial court correctly sustained the demurrer.

To recover on the basis of the theory in the Restatement of Torts, Section 710, the plaintiff must establish that (a) one of the purposes of the Motor Carrier Act is to protect a certificate holder from unauthorized competition, and (b) that the Motor Carrier Act does not negative such liability. It is not clear from the defendant's brief or from oral argument whether or not it takes issue with the proposition stated in part (a) above. It is our opinion that incidental to the objective of the Motor Carrier Act to protect the public from the harm arising out of unregulated competition was the intention to protect a certificate holder from unauthorized competition and that the plaintiff would be entitled to recover under the principle stated in Section 710 of the Restatement of Torts if the Motor Carrier Act does not negative liability. See *Brady Transfer & Storage Co. v. United States*, 80 FSupp 110 (1948), affirmed per curiam 335 US 875, 93 L Ed 418; *Horger v. Flagg, Public Utilities Commissioner, et al.*, 185 Or 109, 128, 201 P2d 515, 202 P2d 526 (1949). The defendant refers to 307(b) of the Motor Carrier Act (49 USCA § 307(b)), which provides, as follows: "No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highway." We do not regard this section as militating against the idea that one of the incidental purposes of the Act is the protection of a certificate holder from competition. It is simply an indirect way of stating that

a certificate holder has a nonexclusive franchise to carry goods over a certain route on the public highway and that other certificates may be issued if public convenience and necessity can be shown.

The crucial and more difficult question in this case is whether the plaintiff can satisfy proviso (b) of Section 710 of the Restatement of Torts by establishing that the Motor Carrier Act does not negative a right of recovery against one who engages in unauthorized competition. It is defendant's position that the Motor Carrier Act, viewed in relation to other legislation covering rail and water transportation reveals the legislative intent to preclude private recovery even though this intent is not expressly stated in the Act. The Motor Carrier Act was enacted in 1935 as an amendment to the Interstate Commerce Act which originated in 1887 and until the 1935 amendment related exclusively to rail transportation. In 1940 the Interstate Commerce Act was again amended to include the regulation of water carriers under statutes referred to as the Water Carrier Act. In making these two amendments the Congress expressly designated them as "Part II" and "Part III", respectively, in the order of their passage, Part I being the original act as amended, relating to rail transportation. The separation of the Interstate Commerce Act into these principal parts is pointed to by the defendant to emphasize the contrast in remedies afforded an injured carrier against one who violates the provisions of the respective parts of the Act. Part I, § 8, provides as follows:

"In case any common carrier subject to the pro-

visions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this chapter required to be done, such common carrier shall be liable *to the person or persons injured thereby for the full amount of damages sustained* in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." USC, Title 49, § 8, p 4294 (1940 Ed). (Italics ours.)

Section 908(b) of Part III is almost identical with Section 8 of Part I. No similar provision affording a private remedy is found in Part II relating to motor carriers. Part II, Section 322(b) provides as follows:

"If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, *the Commission or its duly authorized agent* may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto." USCA Title 49, § 322(b) page 178. (Italics ours.)

Thus it is observed that the provisions for private remedy available under the rail and water carrier parts of the Act have no counterpart in the Motor Carrier Act. Pointing to this difference the defendant relies upon the rule of statutory construction, expressio unius est exclusio alterius, in support of its position that the Congress intended to exclude any private remedy for the violation of Part II of the Act. *Cabell et al v. Cottage Grove et al*, 170 Or 256, 130 P2d 1013 (1943); 2 Sutherland, Statutory Construction, 3rd Ed, § 4915.

The plaintiff argues here as it did in the United States Court of Appeals that the "expressio unius rule is no barrier" to its right of recovery. The Court of appeals decided that the rule should be applied and held that a civil cause of action was not available in the federal courts.

There is no doubt that the provision for private remedy was intentionally excluded from the Motor Carrier Act. This is revealed by the history of the motor carrier legislation. It is apparent that the Motor Carrier Act, enacted in 1935, was the amended version of HR 6836, known as the Rayburn Bill, which was introduced in 1934. Section 17(b) of the Rayburn Bill was worded essentially the same as Section 322(b) but for the addition of language providing a private remedy by way of injunction for persons injured as a result of the violation of the Act. Section 17(b) of the Rayburn Bill read as follows:

> "If any motor carrier operates in violation of any provision of this Act (except as to the reason-

ableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate of public convenience and necessity or permit, the Commission *or any party injured* may apply to the District Court of the United States for any district where such motor carrier operates, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier, its officers, agents, employees, and representatives from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto." (Italics ours.)

Although this section limited the party injured to a remedy by way or restraint against violation as contrasted with the recovery of money damages provided by Section 8 of Part I, and Section 908(b) of Part III, it clearly evidenced the intent to provide one form of private remedy. The omission of the italicized portion of the section when the Motor Carrier Act was finally passed may be regarded as evidencing the legislative intent to exclude the private remedy. Further light is cast on the purpose of the Act by later legislative history: In 1954 Representative Yates introduced HR 8238 which provided for the amendment of Section 322(b) by inserting after "the Commission or its duly authorized agent" the words "or any motor carrier which is being or will be injured by such violation." This bill was not enacted. Thus it is eminently clear that the remedy afforded the carriers in Part I and

Part III was not unwittingly omitted from Part II. Were we to end our examination of the statutes at this point we would conclude that it was the intent of Congress that motor carriers were to be denied a civil remedy in the state as well as in the federal courts.

But the plaintiff contends that other sections of the Interstate Commerce Act must be considered in deriving the intent of Congress. Our attention is first called to certain language in Section 22 of the Interstate Commerce Act, which section is within Part I relating to rail transportation. This section is principally composed of a long recitation of specific exceptions to the provisions of the Act, many of the exceptions having been added by amendment after the original enactment in 1877. Section 22, as originally enacted, read as follows:

> "That nothing in this act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; *and nothing in this act contained shall in any way abridge or alter the remedies not existing at common law or by statute, but the provisions of this act are in addition to such remedies.* * * *"

United States Statutes at Large, Vol. 24, 49th Congress, Session II, Ch 104, § 22, p 387. (Italics ours.)

The plaintiff contends that Section 22 of Part I was incorporated into Part II by the reference in Section 317(b) of Part II. This subsection reads as follows:

> "No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs: *Provided*, that the provisions of sections 1(7) and 22 of this title shall apply to common carriers by motor vehicles subject to the chapter." USCA, Title 49, § 317(b).

It should be noted first that both Section 317(b) and Section 22 relate to tariffs, and more specifically, to permissible deviations from the tariff regulations. This is also true of Section 1(7) which is incorporated into 317(b). It would not be unreasonable to argue that the reference to Section 22 in Section 317(b) was intended to incorporate Section 22 only to the extent that it was relevant to tariff regulation. This would mean that the clause in Section 22 providing that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute" would be

treated as relating only to the remedies at common law or provided by statute relating to tariffs. This, of course, would exclude the remedy for unauthorized competition asserted by the plaintiff in the case at bar. The foregoing is essentially the argument advanced by the defendant. However, we know from the case of *Pennsylvania R.R. Co. v. Sonman Shaft Coal Co.*, 242 US 120, 61 L Ed 188 (1916) that the remedies preserved in Section 22 are not limited to those relating to tariffs. In that case the United States Supreme Court affirmed the Pennsylvania Supreme Court permitting recovery against a railroad company for its failure to comply with a reasonable demand for coal cars. The obligation to supply cars was a common-law duty which existed before the Act. (The common-law rule was adopted in 1906 as a part of the Interstate Commerce Act.) The United States Supreme Court regarded Section 22 as embracing "all existing rights not inconsistent with those which the act creates." The fact that Section 22, the specific provisions of which related to tariffs only, was thus broadly interpreted, would afford a basis for arguing that Section 317(b), although specifically dealing with tariffs only, was intended to have a more pervasive effect by the incorporation of broadly-interpreted Section 22. There is, however, a difference. The reference in Section 22 is to the broad area of "remedies now existing"; on the other hand, the reference in Section 317(b) is to the specific Section 22 which contains specific exceptions to permissible rates. Therefore it is reasonable to argue that Section 317(b) was intended to embody only the specific permissible

deviations set out in Section 22. The fact that the incorporating provision in Section 317(b) refers not only to Section 22 but to Section 1(7) which also deals with specific tariff matters, adds weight to this argument. See Senate Doc. 152, 73rd Congress, Session II, p 48.

Standing alone, the interpretation so limiting Section 317(b) may not be sufficient to exclude the remedies referred to in Section 22. It is not necessary to rest the case on this interpretation alone, for there is a more compelling argument which convinces us that these remedies were not intended to be provided for under the Motor Carrier Act. We shall assume for the purposes of this case that the incorporation of Section 22 into Section 317(b) was such that Section 317(b) would, in effect, read that "remedies now existing at common law or by statute" shall not be abridged by the Motor Carrier Act. So construed, would the remedy claimed by the plaintiff in the case at bar be included? It will be noted that in *Pennsylvania R.R. Co. v. Sonman Coal Co.*, supra, the remedy which was asserted by the plaintiff in that case and recognized by the court was for the violation of a common-law right which existed wholly apart from the statute, although, as pointed out above, the statute later adopted the common-law rule. In the instant case the right which the plaintiff claims cannot be separated from the statute and cannot be said to be an "existing" right if the statute is construed to include only a remedy for rights antedating the enactment of the statute. This is so because the franchise which the plaintiff must have in

order to establish that the was injured by the defendant's conduct is granted under the act of which Section 317(b) is a part. To include the remedy claimed by the plaintiff, Section 317(b) with the incorporation of Section 22 must be regarded as referring to (1) common-law remedies existing wholly apart from Section 317(b) and (2) common-law remedies which arise out of the violation of rights which originate in a statute. The plaintiff would not have a remedy against the defendant in this case were it not for the franchise which was obtained under the statute. Even though we assume that the Congress intended Section 22, as incorporated into Section 317(b) to be interpreted to include remedies derived from rights originating in the statute, we would still be faced with the question as to whether the remedy claimed by the plaintiff was intended to be recognized. If we are thus forced back into the Motor Carrier Act to find the plaintiff's franchise right which is necessary to give the plaintiff the common-law remedy described in Section 710 of the Restatement of Torts, we are again faced with the question originally posed: Was it the intent of the Congress to exclude private relief not only in federal forums, but in state forums as well? It was the opinion of the court in *Consolidated Freightways v. United Truck Lines*, 216 F2d 543 that Congress intended to preclude all forms of private relief. The court said:

> "It is obvious from the whole setting of the Motor Carrier Act that Congress pre-empted this field of control over the motor carrier type of Interstate Commerce. It is abundantly clear that Congress intended regulatory controls to be exercised

> by the Commission and not by or through individuals. There is absolutely no indication in this Act or in case law that private suits might be resorted to, to aid the Commission in its enforcement of the Act and the regulations thereunder."

The court does not disclose the circumstances constituting the setting of the Motor Carrier Act" which would reveal the intent of Congress. We have examined the Congressional Record and the reports of the hearings before the Congressional Committees on the various bills relating to motor carrier legislation and we have been unable to find any discussion of the specific problem of the scope of relief under the Motor Carrier Act. It is clear that the regulation of motor carriers was regarded as presenting problems not involved in the regulation of rail and water transportation. In the reports of the Congressional hearings there are frequent references to the chaotic condition of motor carrier transportation, chiefly resulting from the fact that at the time the proposed Act was being considered there were over 200,000 trucks in operation, 40,000 of which were operated by approximately 10,000 common carriers. In testifying before the Committee on Interstate and Foreign Commerce of the House of Representatives, Joseph B. Eastman, then Federal Coordinator of Transportation, stated:

> "While I am confident that regulation will prove practicable, I also realize the difficulties which will be encountered. In order to meet that, the Commission, in the course of its regulations, will have to feel its way along and be guided by experience as it goes on, and changes in the law may prove necessary because of that experience." Hearing,

Before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, on HR 5262 and HR 6016 (1935) page 29.

There was ample reason for vesting in the Interstate Commerce Commission exclusive control over the regulation of motor carrier transportation, including the preemption of the remedies for violation of the Motor Carrier Act. The variety of operations carried on by large and small contract carriers, common carriers and carriers for hire on overlapping routes under licenses varying in scope, presented unique problems of regulation. At the outset at least it would seem necessary to have some unified and exclusive control in an administrative body in order that the conflicts arising out of the chaotic condition of the industry could be resolved on a systematic and sensible basis. Under the circumstances it is not unreasonable to assume that it was the intent of Congress to place in the Interstate Commerce Commission the exclusive power to determine whether particular violations of the Act should result in punishment. See Note, 68 Harvard Law Rev 1272 (1955), commenting on *Consolidated Freightways v. United Truck Lines*, supra. We find additional support for this view in *Akers Motor Lines, Inc., et al. v. Malone Freight Lines, Inc.*, (Interstate Commerce Commission, Intervenor) 88 F Supp 654 (1950). In that case the plaintiffs brought suit to enjoin the defendant from interfering with the plaintiff's business. The plaintiffs alleged that the defendant was making an unsanctioned use of a route allotted to the plaintiffs under a certificate issued by the Interstate Commerce Commission, and that a result of such

unlawful use the plaintiffs were deprived of revenue. The defendant moved to dismiss the suit on the ground that Part II of the Interstate Commerce Act excluded private remedies. The court sustained the motion to dismiss, resting its decision on the primary jurisdiction doctrine, i.e., that the plaintiffs had not exhausted their administrative remedies before the Interstate Commerce Commission. The court said:

> "Adverting to the provisions of Part II of the Interstate Commerce Act, it becomes at once apparent that within the scheme ordained by the Congress for 'developing, coordinating, and preserving a national transportation system by * * * highway' there is provided administrative machinery, including a commission composed of experts in the technology of the transportation industry, entirely adequate to deal with disputes involving competing carriers. * * * " 88 F Supp 654 at 656.

As evidence of the intent of Congress to deny the private enforcement of violations of the Act the court referred to sections of the Motor Carrier Act, vesting various powers in the Interstate Commerce Commission alone to regulate interstate motor carrier transportation. The court said, at page 656:

> " * * * Specifically, the provisions of the Act relating to the jurisdiction of the Interstate Commerce Commission to regulate motor carriers, its comprehensive power, its authority to investigate and to act upon complaints by any person or organization or upon its own initiative without complaint, together with its provisions as to the necessity for a certificate of convenience and necessity, as to the authority of the Commission to amend, revoke or suspend such certificate, and as to the right of the Commission to resort to the District Courts to enforce obedience to its orders, rules

> and regulations, demonstrate alike the availability of an adequate administrative remedy to plaintiffs and the wisdom of the Congress in plainly indicating that the expertise of the Commission should be utilized in the screening of controversies in the highly technical field of transportation before invoking the more ponderous procedures of the court."

The court in the Akers case assumes that in an appropriate case a private remedy would be available to a plaintiff who exhausted his administrative remedy. We place a different construction on the Motor Carrier Act. We believe that the Act was intended to go even further than that. Considering the history of the Act, the conditions existing at the time of its enactment, the differences in the various statutes relating to transportation, and, aided by the rule of statutory construction, expressio unius exclusio alterius, it is our opinion that the Congress intended to vest in the Interstate Commerce Commission the sole authority to enforce the provisions of the Act, precluding private relief in both federal and state courts either by way of injunction or damages. Therefore the plaintiff is not entitled to recover in this action.

The judgment of the lower court is affirmed.

Appendix B

Interstate Commerce Act, Part I, Section 3(1), 24 Stat. 380, 49 U.S.C. Sec. 3(1):

"Section 3, par. (1) *Uundue preferences or prejudices prohibited*. It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Interstate Commerce Act, Part 1, Section 8, 24 Stat. 382, 49 U.S.C. Sec. 8:

"Sec. 8. Liability in damages to persons injured by violation of law. In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Interstate Commerce Act, Part I, Section 9, 24 Stat. 382, 49 U.S.C. Sec. 9:

"Sec. 9. Remedies of persons damaged: election: witnesses. Any person or persons claiming to be

damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Interstate Commerce Act, Part I, Section 22, 24 Stat. 387, 49 U.S.C. Sec. 22:

"Sec. 22. Restrictions.

Nothing in this chapter shall prevent the carriage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the transportation of persons for the United States Government free or at reduced rates, or the issuance of mileage, excursion, or commutation

passenger tickets; nothing in this chapter shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldier's and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this chapter shall be construed to prohibit any common carrier from establishing by publication and filing in the manner prescribed in section 6 of this title reduced fares for application to the transportation of (a) personnel of United States armed services or of foreign armed services, when such persons are traveling at their own expense, in uniform of those services, and while on official leave, furlough, or pass; or (b) persons discharged, retired, or released from United States armed services within thirty days prior to the commencement of such transportation and traveling at their own expense to their homes or other prospective places of abode; nothing in this chapter shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the free carriage, storage, or handling by a carrier of the household goods and other personal effects of its own officers or employees when such goods and effects must necessarily be moved from one place to another as a result of a change in the place of employment of such officers or employees while in the service of the carrier, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; nothing in this chapter shall be construed to pro-

hibit any common carrier from carrying any totally blind persons accompanied by a guide or seeing-eye dog or other guide dog specially trained and educated for that purpose at the usual and ordinary fare charged to one person, under such reasonable regulations as may have been established by the carrier: *Provided*, That no pending litigation shall in any way be affected by this chapter: *Provided further*, That nothing in this chapter shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this chapter, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section 6 of this title; and all the provisions of said section relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint rates, fares, and charges referred to in said section. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares or charges filed with the Commission in force at the time. The provisions of section 10 of this title shall apply to any violation of the requirements of this proviso. Nothing in this

chapter shall prevent any carrer or carriers subject to this chapter from giving reduced rates for the transportation of property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster, if such reduced rates have first been authorized by order of the Commission (with or without a hearing); but in any such order the Commission shall (1) define such section, (2) specify the period during which such reduced rates are to remain in effect, and (3) clearly define the class or classes of persons entitled to such reduced rates: *Provided*, That any such order may define the class or classes entitled to such reduced rates as being persons designated as being in distress and in need of relief by agents of the United States or any State authorized to assist in relieving the distress caused by any such calamitous visitation or disaster. No carrier subject to the provisions of this chapter shall be deemed to have violated the provisions of such chapter with respect to undue or unreasonable preference or unjust discrimination by reason of the fact that such carrier extends such reduced rates only to the class or classes of persons defined in the order of the Commission authorizing such reduced rates."

Interstate Commerce Act, Part II, Section 306(a)(1), 49 Stat. 551, 49 U.S.C. Sec. 306(a)(1):

"Sec. 306. Certificate of convenience and necessity—(a) Necessity for; carriers in bona fide operation on June 1, 1935; traffic moving to and from Territories and possessions; 'grandfather' provisions

(1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the

United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307(a) of this title and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority

to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter."

Interstate Commerce Act, Part II, Section 316(d), 49 Stat. 558, 49 U.S.C. Sec. 316(d):

"(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Interstate Commerce Act, Part II, Section 317(b), 49 Stat. 560, 49 U.S.C. Sec. 317(b):

"(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or

permit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privilege or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs: *Provided*, That the provisions of sections 1(7) and 22 of this title shall apply to common carriers by motor vehicles subject to this chapter."

Interstate Commerce Act, Part II, Section 322, 49 Stat. 564, 49 U.S.C. Sec. 322:

"Unlawful operation—(a) Violation of chapter or rules or orders: penalty where none otherwise provided

Any person knowingly and wilfully violating any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

Jurisdiction of district courts to restrain violations and enforce orders

(b) If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto

by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto.

Participation in unjust discrimination; evasion of regulation; penalty

(c) Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give, or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this chapter, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this chapter for less than the applicable rate, fare, or charge, or who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this chapter provided for motor carrier or brokers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than $500 for the first offense and not more than $2,000 for any subsequent offense.

Disclosure of information by agent, accountant, or examiner; penalty

(d) Any special agent, accountant, or examiner who knowingly and willfully divulges any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of section 320 of this title, except as he may be directed by the Commission

or by a court or judge thereof, shall be guilty of a misdemeaner and shall be subject, upon conviction in any court of the United States or competent jurisdiction, to a fine of not more than $500 or imprisonment for not exceeding six months, or both.

Disclosure or solicition of information concerning property in transportation

(e) It shall be unlawful for any motor carrier or broker engaged in interstate or foreign commerce or any officer, receiver, trustee, lessee, agent, or employee of such carrier, broker, or person, or for any other person authorized by such carrier, broker, or person to receive information, knowingly to disclose to, or permit to be acquired by any person other than the shipper or consignee without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such motor carrier or broker for such transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used.

Giving information in response to legal process, or to government officers or to other carriers for adjustment of rates permitted

(f) Nothing in this chapter shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the Government of the United States or of any State, Territory, or District thereof, in the exercise of his power, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crimes or to another carrier or broker, or its duly

authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers or brokers.

Failure or refusal to make reports or keep accounts and records; altering or making false report of record; penalty

(g) Any motor carrier, broker, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Commission as required by this chapter, or to make specific and full, true, and correct answer to any question within thirty days from the time it is lawfully required by the Commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Commission, or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully file with the Commission any false report, account, record, or memorandum, or shall knowingly and willfully neglect or fail to make full, true and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this chapter to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or others of the Commission with respect thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof be subject for each offense to a fine of not more than $5,000. As used in this subsection, the words 'keep' and 'kept' shall be construed to mean made, prepared, or compiled, as well as retained.

Civil action for fines; amount; service of process; payment of costs and expenses

(h) Any motor carrier, broker, or lessor, or other person or any officer, agent, employee, or representative thereof, who shall fail or refuse to keep, preserve, or forward any account, record, or

memorandum in the substance, form, or manner prescribed in this chapter or in any rule, order, or regulation prescribed under this chapter, or who shall fail or refuse to comply with any requirement of this chapter with respect to the filing with this Commission or with any agency, officer, or representative of the Commission, as prescribed by the Commission, any annual, periodical, or special report, or other report, tariff, schedule, contract, document, or data or with any rule, order, or regulation prescribed with respect to such filing; or who shall fail or refuse to make full, true, or correct answer to any question required by the Commission to be made under the provisions of this chapter, shall forfeit to the United States the sum of $100 for each such offense and, in case of a continuing violation, not to exceed $50 for each additional day during which such failure or refusal shall continue. All forfeitures provided for in this subsection shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States, brought in the district where the motor carrier or broker has its principal office, or in any district in which such motor carrier or broker was, at the time of the offense, authorized by this Commission, or by this chapter, to engage in operation as such motor carrier or broker; or in any district where such forfeiture may accrue; or in the district where the offender is found. All process in any such case may be served in the judicial district whereof such offender is an inhabitant or wherever he may be found. It shall be the duty of the various district attorneys under the direction of the Attorney General of the United States to prosecute for the recovery of such forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. Feb. 4, 1887, c. 104, Part II, §222, as added Aug. 9, 1935, c. 498, 49 Stat. 564, and amended Sept. 18, 1940, c. 722, Title I, § 25 (c, d), 54 Stat. 928; Aug. 2, 1949, c. 379, § 15, 63 Stat. 488."

Communications Act, Section 605, 48 Stat. 1103 (47 U.S.C. Sec. 605):

"§ 605. Unauthorized publication or use of communications—

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, pub-

lishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, § 605, 48 Stat. 1103.)"

Public Utility Holding Company Act, Section 4(a), 49 Stat. 812 (15 U.S.C. 79d):

"§79d. Transactions by unregistered holding companies

(a) After December 1, 1935, unless a holding company is registered under section 79e of this title, it shall be unlawful for such holding company, direct or indirectly—

(1) to sell, transport, transmit, or distribute, or own or operate any utility assets for the transportation, transmission, or distribution of, natural or manufactured gas or electric energy in interstate commerce;

(2) by use of the mails or any means or instrumentality of interstate commerce, to negotiate, enter into, or take any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell goods to, any public-utility company or holding company;

(3) to distribute or make any public offering for sale or exchange of any security of such holding company, any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company, by use of the mails or any means or instrumentality of interstate commerce, or to sell any such security having reason to believe that such security, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made the subject of a public offering;

(4) by use of the mails or any means or instrumentality of interstate commerce, to ac-

quire or negotiate for the acquisition of any security or utility assets of any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company;

(5) to engage in any business in interstate commerce; or

(6) to own, control, or hold with power to vote, any security of any subsidiary company thereof that does any of the acts enumerated in paragraphs (1-5) of this subsection.

(b) Every holding company which has outstanding any security any of which, by use of the mails or any means or instrumentality of interstate commerce, has been distributed or made the subject of a public offering subsequent to January 1, 1925, and any of which security was owned or held on October 1, 1935 (or, if such company is not a holding company on that date, on the date such company becomes a holding company) by persons not resident in the State in which such holding company is organized, shall register under section 79e of this title on or before December 1, 1935 or the thirtieth day after such company becomes a holding company, whichever date is later. Aug. 26, 1935, c. 687, Title I, § 4, 49 Stat. 812."

28 U.S.C. Section 2101(c), 62 Stat. 962:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

28 U.S.C. Section 1257(3), 62 Stat. 929:

"(3) By writ of certiorari where the validity of

a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

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No. 692

IN THE

Supreme Court of the United States

October Term, 1958

CONSOLIDATED FREIGHTWAYS, INC., a corporation,

Petitioner,

vs.

No. 692

UNITED TRUCK LINES, INC., a corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent submits that a review of this case on certiorari is not warranted and that the petition should be denied and respondent spared any additional expense in defending this claim.

This litigation was originally commenced by petitioner in the United States District Court for the District of Oregon upon an identical complaint. The Federal District Judge for Oregon dismissed the action for want of a substantial federal question, and

the Court of Appeals for the Ninth Circuit affirmed. *Consolidated Freightways v. United Truck Lines*, 216 Fed. (2d) 543. For the convenience of this Court, the opinion of the Ninth Court of Appeals is printed in the appendix to this brief.

Reference to the appended opinion will disclose that the Ninth Court of Appeals held that no substantial federal question was presented in that earlier case, in part because of its view that Congress intended no private remedy for damages between competing motor carriers. Certiorari was denied by this Court. 349 U.S. 905.

The present action was then instituted in the Oregon State Courts, based upon an identical complaint, and the Supreme Court of Oregon having reached an identical conclusion with the earlier opinion of the Ninth Court of Appeals, petitioner, Consolidated Freightways, Inc., again seeks a review by this Court by writ of certiorari.

If there was no substantial federal question in the prior litigation in the Federal Courts, it is difficult to see how there could be a substantial federal question presented by the identical complaint which has now been rejected by the Supreme Court of the State of Oregon.

At page 9 of its petition for writ of certiorari, petitioner states,

> "These questions ought to be settled by this Court and not left for agreement or disagreement

with the Oregon Supreme Court by countless federal and state courts. The questions are of sufficient importance so that an authoritative decision ought to be made, one way or the other, at this time."

What is here overlooked is that, in the twenty-four years since the adoption of the Motor Carrier Act as Part II of the Interstate Commerce Act, this litigation represents the one and only reported instance in which one motor carrier has attempted to sue another motor carrier for money damages for unlawful competition. During this same twenty-four years, the reports of the Interstate Commerce Commission and the decisions of the federal courts abound with instances where one motor carrier has been found to be operating over a given route without a proper certificate and has been enjoined from continuing so to do. Petitioner Consolidated Freightways, Inc., has itself been so enjoined. See: *Interstate Commerce Commission v. Consolidated Freightways*, 41 Fed. Supp. 651; and *Consolidated Freightways v. U. S.*, 136 Fed. (2d) 921.

In other words, in this period of twenty-four years, there have been innumerable instances in which carriers certificated over a particular route might have attempted to sue an enjoined carrier which had been operating over the same route in excess of its certificated authority, and it seems only fair to conclude that all others have recognized that there is no private remedy for money damages in such cases.

With the myriad web of highways criss-crossing the nation, those who drafted the Motor Carrier Act undoubtedly anticipated the impossibility of completely delineating routes between carriers and the vast amount of litigation that would be stirred up if the doors were opened to private suits for damages between competing carriers.

Thus it was that the Motor Carrier Act of 1935, which otherwise followed rather closely the form of the Railroad Act (Part I of the Interstate Commerce Act), contained no provision for actions for damages against one who violated the Act, as did Section 8 of the Railroad Act (49 U.S.C.A. §8). The further fact that, subsequent to the enactment of the Motor Carrier Act, Congress in 1940 adopted the Water Carrier Act as Part III of the Interstate Commerce Act and there again (49 U.S.C.A. §908 b) specifically authorized suits for damages against water carriers who violated the Act, using substantially the same language as Section 8 of Part I of the Act, can leave little doubt as to the Congressional intent to deny a private remedy for violations of the Motor Carrier Act, in view of its intermediate enactment.

Other than this litigation, no other suits of this nature have been attempted in the past twenty-four years and certainly, with the recent agreement of the Ninth Court of Appeals and the Oregon Supreme Court that there is no such right of action, there is no reason to anticipate any litigation in the future

which will result in conflicting decisions or an unsettled state of the law as petitioner suggests.

The petition for certiorari places great reliance upon the case of *Pennsylvania R. R. v. Sonman Coal Co.*, 242 U. S. 120. The Oregon Supreme Court adequately dealt with the *Sonman Coal Co.* case in its opinion and no further comment on our part seems necessary. We do, however, point out that the *Sonman Coal Co.* case was also heavily relied upon by petitioner in its earlier petition to this Court for certiorari to the Ninth Court of Appeals, which petition, as before stated, was denied by this Court. 349 U. S. 905.

CONCLUSION

On the basis that there is no federal question of substance, nor anything about the decision of the Oregon Supreme Court which is out of harmony with applicable decisions of this Court, nor any special or important reasons for a review, we urge that the petition for certiorari be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONSOLIDATED FREIGHTWAYS, INC., A Corporation, *Appellant*,

vs.

UNITED TRUCK LINES, INC., a Corporation, *Appellee*.

No. 13,890

Oct. 19, 1954

Appeal from the United States District Court for the District of Oregon

---

Before: BONE, ORR and CHAMBERS, Circuit Judges

BONE, Circuit Judge.

Both parties to this action are Washington corporations and common carriers of property operating motor trucks which cross state lines. Their operations come under the jurisdiction of the Interstate Commerce Commission by virtue of the provisions of Part Two of the Interstate Commerce Act, as amended, covering operations of such motor carriers, herein, the Motor Carrier Act (Title 49 U.S.C.A. sections 301 to 327, inclusive) being Chapter Eight of the present Interstate Commerce Act.

Appellant instituted this action in the lower court seeking only money damages from appellee. Its complaint purported to invoke the jurisdiction of the

court "Under the general laws relative to actions at law arising under the Constitution and laws of the United States, and particularly under the Interstate Commerce Act, as ammended;" and pursuant to the provisions of Section 1337 of Title 28, U.S.C.A.

The facts upon which appellant predicates its claim for relief are that it held a certificate from the Interstate Commerce Commission to transport property over U. S. Highway No. 30; that appellee did not hold such a certificate over U. S. Highway No. 30; that appellee, notwithstanding, had been transporting property over that highway and had thereby diverted traffic and revenues from appellant. The complaint demanded money damages therefor.

Appellee, by a Motion to Dismiss, challenged the jurisdiction of the lower court on the ground that the complaint, upon its face, shows that there is no diversity of citizenship between the parties, and that there is no federal question involved in this litigation. The lower court granted appellee's motion and dismissed the action "for want of federal jurisdiction."

Appellant seeks reversal of the lower court's order of dismissal on either of two theories, posed as follows:

(1) A complaint alleging a violation of the Motor Carrier Act to appellant's monetary damage presents a federal question even though the Act does not specifically provide for such damages, and

(2) The Motor Carrier Act by reserving common

law remedies created a federal right cognizable in a district court as a federal question.

These contentions are considered in the order stated.

APPELLANT'S FIRST POINT

As to the first proposition appellant frankly admits that it "can find no case holding that a complaint alleging a violation of the Motor Carrier Act and seeking damages, presents a federal question." It also expresses the belief that "the exact question has never before been raised."

In the complete absence of authority appellant relies upon our opinion in Fratt v. Robinson, 203 F. 2d 627, a case involving a suit for money damages resulting from a violation of Section 10(b) of the Securities Exchange Act (15 U.S.C.A. 78j(b). It asserts that the Fratt case is "indistinguishable in principle" from the case at bar, and declares it to be "exactly comparable."

We cannot agree with appellant's view of the effect of the Fratt decision on the issue posed in this case, for we think that the problem in Fratt was quite different from the problem here considered. One of the distinguishable features is that the Fratt case arose under the Securities Exchange Act which contains this provision (15 U.S.C.A. 78 aa)

> "The district courts * * * shall have *exclusive jurisdiction* of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce

> any liability or duty created by this chapter or the rules and regulations thereunder." (Italics ours.)

No claims are here made that appellant's purported cause of action or claim for relief could not be asserted and properly adjudicated in a state court.

Appellant concedes that "except for its reservation of common law remedies, the Federal Motor Carrier Act is silent as to any private remedy for a violation of any of its provisions. All it does is provide for criminal penalties and injunctive remedies to be sought by the Commission." But appellant argues that "the *expressio unius* rule is no barrier" to assertion of its claim; and referring to our Fratt opinion, it argues that we there held, upon the authority of Bell v. Hood, 327 U.S. 678, that a complaint seeking money damages for violation of a federal statute raised a federal question even though the portion of the statute which was alleged to have been violated did not provide for damages for that violation. Pursuing this line of argument, appellant urges us to compare the Securities Exchange Act of 1934 with the Motor Carrier Act, for it contends that in the Fratt case we approved a claim for damages under Section 10(b) of the Securities Exchange Act, although that section provided no right to damages, while other sections of the Act did provide for damages.

In oral argument appellant urged that Part I of the Interstate Commerce Act (the original Act) and Part II of the Interstate Commerce Act (The Motor

Carrier Act of 1935) must be regarded as one piece of legislation on the theory that Part II is merely an amendment of Part I and as such necessarily "incorporates," i.e., assimilates, the provisions of Sections 8 and 9 of Part I (49 U.S.C.A., Sections 8 and 9).[1]

We do not agree with the theory advanced in the preceding paragraph. As we have indicated above, Part II makes provision only for criminal penalties and injunctive remedies to be sought by the Commission. In contrast with Part I, Part II is silent as to any private remedy for a violation of any of its provisions. This omission is significant, and persuades us that Part II is to be regarded as a wholly independent legislative enactment in which Congress deliberately elected to provide no remedies for violation of any of its provisions other than those carefully spelled out in Part II itself.

Relying on language in the Fratt case, appellant urges that we should not apply the *expressio unius* rule in the case at bar. We think that the rule should be applied. Appellant then points out (by way of analogy) that in similar fashion, the Motor Carrier Act provides for criminal penalties and injunctive remedies, but does not provide a right to damages.

[1]These two sections of the original Act make any common carrier under that Act liable in damages to the person or persons injured by its violation. They permit an action for recovery of such damages to be brought in any district court of the United States unless the injured party elects to rely for relief on a complaint he may make directly to the Commission. If he resorts to such complaint to the Commission, he is denied the right to maintain a private suit for damages in the federal courts.

Furthermore, we do not agree with appellant's argument that "the *expressio unius* rule is no barrier here." On the contrary, we think that there was an excellent reason why Judge Clark did not apply this rule in his dissent in the Baird case (141 F. 2d 238) to which we referred in our Fratt opinion. That reason is not present in this case. In our Fratt opinion we said (p. 632):

> "Judge Clark disposes of the applicability of the *expressio unius est exclusio alterius* rule, (and we are in agreement with him,) by pointing out that the sections which contain specific rights of action are '* * * sections [which] deal with special matters only indirectly germane to the regulation of securities exchanges; they provide for more unrestricted recovery than would be possible at common law; and they prescribe narrow statutes of limitation.'"

Appellant also relies on Bell v. Hood, supra. Bell based his right to bring his action in a federal court on a charge resting on a theory that the defendants had tortiously deprived him of *rights* guaranteed by the Fourth and Fifth Amendments.

The basic distinction between the posture of the Bell case and that of the case at bar can be seen in a quote in appellant's brief as follows: "This Court in the Fratt opinion quoted from the Supreme Court's opinion in the Bell case on the Federal question point as follows:

> "* * * where federally protected *rights* have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (Italics ours.)

Obviously, the Bell case was concerned with *rights guaranteed* by the Fourth and Fifth Amendments (although basicly these rights were to be protected against invasion by government). In 1893, the Supreme Court said in Monongahela Navigation Co. v United States, 148 U. S. 312 at 324:

> "The first 10 amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the government would assume and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights."

It is equally obvious that in the case at bar appellant had no such *protected rights*. It had sought and received from the federal regulatory body a certificate of public convenience and necessity under which authority it was *permitted* to transport property over U. S. Highway No. 30. Without such a certificate appellant could not lawfully operate over this interstate highway as a motor carrier; the Motor Carrier Act and regulations issued pursuant thereto authorize the Interstate Commerce Commission to secure injunctions from federal courts to stop interstate motor truck operations by an operator who does not possess such a certificate (Cf. United Truck Lines, Inc. v. Interstate Commerce Commission, 189 F.2d 16, cert. denied 342 U. S. 830).

In the Bell case (p. 683) the court said:

"* * * the alleged violations of the Constitution here are not immaterial but form rather *the sole basis of the relief sought.*" (Italics ours.)

Although appellant in the case at bar charged appellee with a breach of the Interstate Commerce Act by transporting property for compensation in interstate commerce without obtaining from the Commission a "certificate" over the route in question, still it does not clearly appear that the complaint was "drawn so as to claim a right to recover under the Constitution and laws of the United States," or that appellee's alleged violation of the Motor Carrier Act forms the "sole basis of the relief sought." In fact appellant's contentions clearly and bluntly establish that the real basis of its suit is "unfair competition," and that appellee's violation of the Interstate Commerce Act had the legal effect of creating a common law right of action in favor of appellant under a theory of liability discussed in Section 710 of the Restatement of Torts dealing with "Engaging in Business in Violation of Legislative Enactment."

In a Memorandum of Authorities provided for the district court, appellant emphasized that the basis for the recovery sought by it was *a violation of the common law.* There it said:

"The substantive law of this case is bottomed upon the proposition contained in Sec. 710 of the Restatement of Torts (American Law Institute, Vol. 111, 1938):

" 'Sec. 710. Engaging in Business in Violation of Legislative Enactment.

"'One who engages in a business or profession in violation of a legislative enactment which prohibits persons from engaging therein, either absolutely or without a prescribed permission, is subject to liability to another who is engaged in the business or profession in conformity with the enactment, if, but only if,

"'(a) one of the purposes of the enactment is to protect the other against unauthorized competition, and

"'(b) the enactment does not negative such liability.'

"A careful study of the Interstate Commerce Act, as amended, including the Motor Carrier Act of 1935, and of the legislative history and administrative and court interpretations of the Act, leaves no doubt that the Act is of the character described in the Restatement proposition."

This memorandum then traced the common law development of this theory from a case in 1706, this to establish its right to recover on the basis of "unfair competition." Absolutely no claim is made of a right to recover based on the statute itself.

It is obvious from the whole setting of the Motor Carrier Act that Congress pre-empted this field of control over the motor carrier type of Interstate Commerce. It is abundantly clear that Congress intended regulatory controls to be exercised by the Commission and not by or through individuals. There is absolutely no indication in this Act or in case law that private suits might be resorted to, to aid the Commission in its enforcement of the Act and the regulations thereunder.

APPELLANT'S SECOND POINT

As we have indicated, appellant sought to recover in the lower court on a common law cause of action based on the principle announced in Section 710 of the Restatement of Torts. And in this case there was no diversity of citizenship between the parties.

Appellant invokes and specifically relies on certain language appearing in Chapter One of the original Interstate Commerce Act,[2] Part One (49 U.S.C.A., Section 22, which chapter deals only with carriers *other than* motor carriers). This language reads as follows:

> "* * * and nothing in this chapter [Chapter One] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; * * *"

The language thus used in Section 22 was obviously intended to apply *only to carriers other than motor carriers.*

A later amendment (1935) to the original Interstate Commerce Act became the Motor Carrier Act with which we are here principally concerned.

Appellant further relies on a certain provision in the Motor Carrier Act (Section 317(b)) which carried over into this later Act the various provisions of Section 22 of the older Interstate Commerce Act. This provision (317(b)) reads as follows:

---

[2]See Chapter One, Interstate Commerce Act Part One, 49 U.S.C.A., Sections 1 to 27, inclusive.

"Provided, That the provisions of Section 22 of this title [49] shall apply to common carriers by motor vehicles subject to this Chapter."

Appellant's case thus necessarily rests upon the assumption that the two statutory provisions just above quoted establish its right to maintain in a federal court a cause of action based on common law remedies *for unfair competition*, this, because such remedies arise "under an Act of Congress," hence jurisdiction exists under Section 1337, Title 28, U.S.C.A.

A brief reference to Section 22, supra, is in order. That section specifies in great detail various kinds of *restrictions* which may not be imposed on various operational activities of the interstate carriers referred to, and covered by, the terms of Chapter One of Part One of the original Interstate Commerce Act. The language used in said Section 22 simply and specifically removed any barriers to these particular carriers exercising certain enumerated *privileges* in respect to their business operations, and a reference thereto renders it unnecessary to here restate these particular *privileges*.[3]

The specific language appearing in the body of the text of Section 22, supra, refers to preservation of *remedies* "now existing at common law or by statute," but appellant does not attempt to rely upon, nor does

[3] We think that so far as concerns the issues of this case, the effect of the cited language in Section 317(b) of the Motor Carrier Act was to confer on motor carriers the same character of immunities and privileges then enjoyed by rail carriers by virtue of the provisions of Section 22 of the original Interstate Commerce Act.

it cite, any judicial authority indicating resort to, or the application of, orthodox common law remedies against the carriers covered by Chapter One of the Interstate Commerce Act in any instance where *unfair competition* between carriers in the securing of business was the basis of a demand for relief. As we have indicated above, appellant makes no such showing, and we are persuaded that none can be made.

Appellant has furnished us with memos in its brief indicating the filing of complaints by various parties against the Pennsylvania Railroad Company (in 1908) in the Court of Common Pleas of Clearfield County, Pennsylvania. Failure or refusal to furnish coal cars, and discrimination and preferences *in this regard* appears to be the gravamen of the charge in the complaints in these state cases. Unfair competition between rail carriers was not involved.

The outsome of the litigation in these state cases is not shown, and in any event Chapter One of the Interstate Commerce Act specifically prohibited the above noted practices by a railroad common carrier, and in addition, Sections 8 and 9 of Chapter One specifically authorize private suits for damages against a carrier by a person or persons injured by a carrier's violation of the Act. Even though a common law remedy invoked in a state court might have ultimately been judicially held to be available to shippers denied sufficient coal cars, by an interstate rail carrier, it must be pointed out that the *right* to cars directly arose under federal law.

In the case at bar, appellant concedes that no statutory right to a common law remedy for damages for alleged "unfair competition" of a motor carrier is preserved, as is (and was) the *statutory right* of shippers in 1908 to have coal cars provided by a railroad common carrier.

As Judge Soloman said in his oral opinion in the district court, "The fact that the Motor Carrier Act does not abridge or alter the carrier's common law rights does not give plaintiff a right under Federal Law." We agree.

Judgment is affirmed.

(Endorsed:) Opinion. Filed Oct. 19, 1954.

Paul P. O'Brien, Clerk.

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Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

In its brief opposing the petition for Writ of Certiorari, respondent reviews the earlier federal litigation between the parties based upon a complaint similar to the present one and concludes at p. 2:

> "If there was no substantial federal question in the prior litigation in the Federal Courts, it is difficult to see how there could be a substantial federal question presented by the identical complaint which has now been rejected by the Supreme Court of the State of Oregon."

In the petition we pointed out that the Court of Appeals for the Ninth Circuit affirmed the District Court's dismissal of the complaint for want of jurisdiction for the reason according to the Court that ". . . Absolutely no claim is made of a right to recover based on the statute [the Motor Carrier Act] itself." (Petition, p. 4, 216 F. (2d) at p. 547)

The language of the Court of Appeals which concluded with this quotation is as follows:

> "Although appellant in the case at bar charged appellee with a breach of the Interstate Commerce Act by transporting property for compensation in interstate commerce without obtaining from the Commission a 'certificate' over the route in question, still it does not clearly appear that the complaint was 'drawn so as to claim a right to recover under the Constitution and laws of the United States,' or that appellee's alleged violation of the Motor Carrier Act forms the 'sole basis of the relief sought.' In fact appellant's contentions clearly and bluntly establish that the real basis of its suit is 'unfair competition,' and that appellee's violation of the Interstate Commerce Act had the legal effect of creating a common law right of action in favor of appellant under a theory of liability discussed in Section 710 of the Restatement of Torts dealing with 'Engaging in Business in Violation of Legislative Enactment.'
>
> "In a Memorandum of Authorities provided for the district court, appellant emphasized that the basis for the recovery sought by it was *a violation of the common law*. There it said:
>
> 'The substantive law of this case is bottomed upon the proposition contained in Sec. 710 of the Restatement of Torts (American Law Institute, Vol. 111, 1938):
>
> 'Sec. 710. Engaging in Business in Violation of Legislative Enactment.

'One who engages in a business or profession in violation of a legislative enactment which prohibits persons from engaging therein, either absolutely or without a prescribed permission, is subject to liability to another who is engaged in the business or profession in conformity with the enactment, if, but only if,

(a) one of the purposes of the enactment is to protect the other against unauthorized competition, and

(b) the enactment does not negative such liability.

'A careful study of the Interstate Commerce Act, as amended, including the Motor Carrier Act of 1935, and of the legislative history and administrative and court interpretations of the Act, leaves no doubt that the Act is of the character described in the Restatement proposition.'

"This memorandum then traced the common law development of this theory from a case in 1806, this to establish its right to recover on the basis of 'unfair competition.' Absolutely no claim is made of a right to recover based on the statute itself." (Resp. Br., App., pp. 13-14, emphasis the Court's)

Thus it is clear that the federal complaint was dismissed by the Court of Appeals because it thought plaintiff there relied for liability on a breach of the common law rather than on a breach of the Motor Carrier Act.

As to the present case, we said in the Petition (p. 5) that the Oregon Supreme Court ". . . extensively analyzed the Congressional history of the Federal Motor Carrier Act (Tr. 3; 253-4), distinguished this Court's opinion in *Penna. R.R. Co. v. Sonman Coal Co.*,

242 U.S. 120 (Tr. 3; 256-8) and, though stating that it was '. . . unable to find any discussion of the specific problem of the scope of relief under the Motor Carrier Act . . .' (Tr. 3; 259), nevertheless concluded that Congress intended that the Act be enforced solely by the Interstate Commerce Commission and that, accordingly, private claims for relief were precluded in both federal and state courts (Tr. 3, 262) . . ."

Thus, not only does the Supreme Court of Oregon's opinion make it clear that that Court held petitioner was relying on the Federal Motor Carrier Act, the Court has executed its Certificate of Existence of Federal Question to that effect (Tr. 9).

Conclusion

For the reasons stated in the Petition, the writ should issue.

Respectfully submitted,

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